APPEAL NO. 93155

On January 12, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issues at the hearing were whether the respondent (claimant herein) had good cause for not reporting her injury to her employer, (employer), within 30 days of the injury, and whether the claimant made an election of remedies by "filing bills on her group insurance." The hearing officer determined that the claimant had good cause for failure to give notice of injury to her employer in a timely manner; that the doctrine of election of remedies is not applicable to a claim arising under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act); and that the claimant did not elect to receive group health insurance benefits to the exclusion of workers' compensation benefits. The appellant (carrier herein) requests that the Appeals Panel reverse the decision and order of the hearing officer and render a decision that the claimant did not have good cause for failure to give timely notice of injury to her employer and/or the claim is barred by the doctrine of election of remedies. In the alternative, the carrier requests that the hearing officer's decision be reversed and remanded for further consideration and development of the evidence. The claimant's response to the carrier's request for review was not timely filed and will not be considered.

DECISION

We modify that portion of the hearing officer's decision relating to the application of the election of remedies doctrine to claims arising under the 1989 Act to reflect that the election of remedies doctrine may appropriately apply, and as modified, the decision of the hearing officer is affirmed.

The claimant began working for her employer in 1982. In 1989 she sustained a work-related neck injury and had a fusion performed at the C5-6 level by Dr S., in August 1989. She returned to work seven weeks after her surgery. On January 30 and 31, 1992, the claimant moved reference books in the employer's library as part of her duties as science librarian and felt pain and a tingling sensation in her right elbow. She said that within a day or two she began putting ice on her elbow at home and taking over-the-counter medication. The claimant testified that over a period of several weeks her condition developed to the point where she could not lift a light book or even her coffee cup, and that she saw Dr. M., a chiropractor, on February 24, 1992 for her elbow. Medical reports from Dr. M were not in evidence. The claimant said that she saw Dr. M 13 times in a 20 day period and that he told her she had "tennis elbow." The claimant said that Dr. M' treatments consisted of electrical stimulation of her arm, cold packs, and adjustments by pressing down on her neck. The claimant said that she told her supervisor, Ms. J, that she had a doctor's appointment on February 24th, and that on February 25th she told her supervisor she had a series of appointments with her chiropractor. The claimant did not say that she reported an on-the-job injury to her supervisor on February 24th or 25th.

The claimant further testified that in mid-March 1992, she called Dr. Ss office for an appointment because Dr. M' treatment was not helping her and because she had developed neck and back symptoms after about two weeks of Dr. M' treatments. She said that her neck and back symptoms were similar to the symptoms she had experienced before her fusion operation in 1989. Dr. S did not see the claimant until April 13th, but scheduled her for a CAT scan of her neck on March 24th and advised her to quit seeing her chiropractor. The claimant was on vacation from March 23rd through March 27th. On Friday, March 27th, the claimant took the CAT scan to Dr. S office, was not able to see Dr. S, but was told by Dr. S nurse that Dr. S had looked at the CAT scan and that "it was a neck problem. It was another bulging disk." The claimant testified that she realized at this time that "it was a serious problem; we weren't just talking about an elbow pain problem that would disappear with minimal treatment."

The claimant stated that on Monday, (date), she attempted to report her injury to the employer's nurses but the nurses were not in so she called her employer's benefits section and was told that the employer's nurses were the only people who took workers' compensation reports. A risk manager employed by the employer testified that the employer's handbook instructs employees to immediately report on-the-job injuries to the employer's nurses and to then follow-up with the supervisor. On March 31st the claimant said that she reported to one of the employer's nurses that she had a problem with her neck and that she felt the problem developed with her elbow from moving the books. The claimant said that on April 1st she mentioned her injury to her supervisor and told her she had reported it to the employer's nurse. The claimant also testified that except for her treatments with Dr. M and her vacation at the end of March, she had not missed any work at the time she reported her injury to the employer's nurse on March 31st. The claimant further stated that on April 13, 1992, Dr. S told her she had a bulging disc and that he wanted her to go through physical therapy.

The claimant also testified that although she was aware that her elbow problem was work related as soon as she felt pain in her elbow while moving the books at work and had elbow pain through the time she went to see Dr. M on February 24th, she did not report the injury because she was trying to ignore it, and because she thought it was just a strain which was not serious and thought that it was a minor problem.

An MRI scan done in July 1989 revealed a left posterior C5-6 disc herniation with left-sided cord impingement. A CAT scan done in March 1992 revealed a previous anterior cervical fusion at C5-6 that appeared solid and a probable disc protrusion centrally and more to the right at C4-5. In a letter dated July 13, 1992, Dr. S stated that it was his opinion that the claimant's current complaints and symptoms are a result of the incident occurring on (date of injury). On May 4, 1992, the physical therapist that Dr. S had referred the claimant to stated that, due to non-coverage, the claimant would no longer be attending physical therapy.

The hearing officer found that the claimant reported her work-related injury to her employer on March 31, 1992. This finding is not challenged on appeal. The carrier contends that the hearing officer erred in concluding that the claimant had good cause for failure to give notice of injury to her employer in a timely manner. Article 8308-5.01(a) provides that the employee or a person acting on the employee's behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. An employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and the carrier of liability, unless the employer or the carrier has actual knowledge of the injury or the Commission determines that good cause exists for failure to give notice in a timely manner.

Good cause for delay is an issue which may arise both as to notice of injury and filing a claim for compensation. In Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948), the Supreme Court of Texas stated:

> The term 'good cause' for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

In Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App. - Amarillo, 1960, no writ), the court stated that "the law is well settled that a bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause for delay." In Crawford, the employee sustained a hernia on December 17, 1957. She asserted that her lack of knowledge of the seriousness of her injury constituted good cause for delay in giving notice of injury to her employer and in filing her claim for compensation. The employee continued to work until January 1959. On the 14th day of that month, she became ill and fainted while working. During the interim from December 17, 1957, to January 14, 1959, she had no difficulty with the hernia except an ache in the leg which she said she did not associate with the injury. When she was admitted to the hospital on January 14, 1959, she was ill with a high temperature, a sore throat, and a duodenal ulcer. Before she left the hospital, a doctor told her she had a hernia and to come to his office in two weeks which would have been February 9th. On February 9th,

the doctor told her not to work anymore. The employee gave notice of injury to her employer on that day and the next day went to an attorney who immediately filed her claim for compensation. The claimant testified that she did not know that hernias were serious. The jury found that the employee had good cause for failing to give notice of injury within the required time period. On appeal, the court affirmed the judgment for the employee holding that the evidence justified submission of issues inquiring whether the employee had good cause for not giving notice of injury within the required time. The court noted that in Hawkins, *supra*, the Supreme Court of Texas recognized that there will be some delay between the time of filing and the time a claimant knows or suspects the true facts where there is misapprehension as to the nature and seriousness of the injury.

In Aetna Casualty Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App. - Fort Worth 1971, writ ref'd n.r.e.), the court held that the employee's testimony indicating that she believed that her back injury was trivial and would not disable her was an adequate showing of good cause for her failure to give notice of the injury within the statutory 30-day period. The court cited Texas Indemnity Ins. Co. v. Cook, 87 S.W.2d 830 (Tex. Civ. App. - Austin 1935, writ ref'd) for the proposition that "[g]ood cause for delay from the viewpoint of ordinary prudence is ordinarily a question of fact; but where the evidence taken most strongly in favor of the claimant admits of but one reasonable conclusion negating good cause, the question becomes one of law." The court held that the evidence did not admit of but one reasonable conclusion which would negate good cause and thus a fact issue on the question was presented which was resolved against the carrier.

In Baker v. Westchester Fire Insurance Company, 385 S.W.2d 447 (Tex. Civ. App. - Houston 1964, writ ref'd n.r.e.), the trial court instructed the jury to return a verdict for the carrier. On appeal, the court held that the evidence raised a jury question whether the employee, who testified that she considered her injury trivial even though she suffered severe pain at times and had been informed by a doctor that she had a pinched nerve, had good cause for failing to give notice of injury and to timely file her claim for compensation. The employee felt a pop in her back and a sharp pain while working on date). Although she continued to have pain in her back, she continued to work for six months and did not inform anyone of her condition. During that period, she was unable to work at various times and lost about one week's time. The intensity of her pain varied. At times it was so severe that she could hardly turn over at night, and sometimes she could hardly get in and out of her car. However, since she was free of pain at times, she thought there "was not much to it, nothing to it." In June, 1961, for the first time, she went to see a doctor. The doctor placed her in the hospital for two weeks and told her that she had a pinched nerve. Although her back continued to hurt her off and on, she was able to do housework and stopped going to the doctor. She continued to believe that she was going to get better until she had a "real bad spell" in January 1962 and consulted an attorney who promptly filed her claim for compensation. In determining that the evidence

raised a fact issue for the jury on the issue of good cause for failure to give timely notice of injury and to timely file a claim for compensation, the court observed that it could not say that the employee's belief that her injury was not serious was one "beyond the pale of reason" or was a belief which could not be entertained by a prudent person under the circumstances.

Under the 1989 Act, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The hearing officer is entitled to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977 1974, writ ref'd n.r.e.). Having reviewed the record in this instant case, we conclude that the hearing officer's conclusion that the claimant had good cause for failure to give timely notice of injury to her employer is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The claimant's testimony indicates that up until March 27, 1992, she believed she suffered only from "tennis elbow" as told to her by her chiropractor, that her injury was not serious, and that her injury was "minor." Upon becoming aware of the seriousness of her injury on March 27th when Dr. Ss nurse told her that the MRI of March 24th revealed a bulging disc, the claimant took action on the next working day, Monday, March 30th, to inform her employer of her injury and was successful in reporting the injury on March 31st, when the company nurse to whom she was to report her injury was available. In our opinion, the case of Aetna Casualty Company v. Hughes, 497 S.W.2d 283 (Tex. 1973), which is cited by the carrier, is readily distinguishable from the facts of the instant case. In Hughes, the Supreme Court of Texas held that the claimant, who sustained severe injuries when run over by a tractor and mowing device, and who was initially hospitalized for three months during which time numerous operations were performed on him, lacked good cause for failure to file his claim for compensation benefits during the statutory time period. The court noted that the claimant had a manifestly serious and disabling condition of which he was fully aware and that it was a condition which should and would have led any reasonably prudent person under the same or similar circumstances to protect his rights by filing his claim. We cannot conclude that the claimant in the instant case was fully aware of a serious and disabling condition given her stated belief that she suffered from tennis elbow until informed of the results of her MRI scan.

The second issue at the hearing was whether the claimant made an election of remedies by "filing bills on her group insurance." The employer provides group health insurance for its employees with (the group health insurer). The claimant testified that she signed a group health insurer form entitled "Benefits Request Form - Medical" when she first saw Dr. M, but said that she did not fill out the form and could not remember if the form was filled out at the time she signed it. The benefits request form indicates that the claimant's condition was not caused by an on-the-job injury. She also testified that

she knew that her medical bills from Dr. M were submitted to the group health insurer rather than the employer's workers' compensation insurance carrier, and in a letter to the Commission dated May 5, 1992, indicated that, in regard to Dr. M' bills, she did not list her job as the source of her problem because of problems she had experienced from her employer in regard to her 1989 workers' compensation claim. She said that she was used to using the group health insurer and that she was not really thinking about anything except that she had an elbow problem. The carrier contends that the hearing officer erred in concluding that the doctrine of election of remedies is not applicable to a claim arising under the 1989 Act, and erred in concluding that the claimant did not elect to receive group health insurance benefits to the exclusion of workers' compensation benefits.

An election of remedies is the act of choosing between two or more inconsistent but coexistent modes of procedure and relief allowed by law on the same state of facts. When a party thus chooses to exercise one of them he abandons his right to exercise the other remedy and is precluded from resorting to it. Custom Leasing, Inc. v. Texas Bank & Trust Company of Dallas, 491 S.W.2d 869 (Tex. 1973). It has been said that the doctrine of election of remedies is not a favorite of equity and that its scope should not be extended. Custom Leasing, *supra*. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the worker filed claims for both group and workers' compensation insurance, except she first filed her workers' compensation case, settled it, then filed her claim for group insurance benefits. The settlement excluded any payment for past or future medical or hospital expenses. The Supreme Court of Texas held that where the worker lacked knowledge of whether the injury was occupational or nonoccupational at the critical time, eventual settlement of the compensation claim was not an informed election that barred the worker's action on the group medical and hospital policy to recover the amount of her medical and hospital bills resulting from nonoccupational disease. In discussing the election of remedies doctrine, the court said that the single underlying principle of the election doctrine has not been found, and that:

> The court of civil appeals in this case has, perhaps more soundly, held that inconsistency will bar an action in instances of manifest injustice. Even though the inconsistent position may not fit the mold of a better defined principle, an election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust.

The court in Bocanegra defined the elements of the election doctrine as follows:

> The election doctrine, therefore, may constitute a bar to relief when (1) one

> successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice.

The court further stated that:

> One's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice.

In Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App. - Fort Worth 1985, no writ), the Court of Appeals held that the employee's workers' compensation claims were barred under the doctrine of election of remedies. The court pointed out that the summary judgment proof showed that the worker applied for group insurance benefits known by him to be available only for a non-work-related disability; he thereafter accepted such benefits, both before and after he filed the workers' compensation claims; and that the inconsistent positions taken by the worker in his application for and acceptance of group benefits, on the one hand, and in his workers' compensation claims amounted to inconsistent remedies and formed the basis for the granting of the summary judgment. The court pointed out that the worker's deposition testimony and admissions clearly showed that he made an informed election to first file his claim for group insurance and that the worker continued to file group insurance claims all along, and only filed his first workers' compensation claim when his group disability benefits were about to expire. However, in Overstreet v. Home Indemnity Company, 678 S.W.2d 916 (Tex. 1984), the Supreme Court of Texas held that a substantial fact issue existed as to whether the employee made an informed election by filing under her employer's group insurance policy before seeking workers' compensation benefits, precluding summary judgment in favor of the workers' compensation insurance carrier. *See also* Northwestern National Insurance Company v. Kirchoff, 427 S.W.2d 638 (Tex. Civ. App. - Houston [14th Dist.] 1968, no writ); Allstate Insurance Company v. Perez, 783 S.W.2d 779 (Tex. App. - Corpus Christi 1990, no writ).

Bocanegra, Smith, Overstreet, Kirchoff, and Perez all applied the doctrine of election of remedies, albeit with differing results, to situations involving workers' compensation claims under the prior workers' compensation law, Tex. Rev. Civ. Stat. Ann. art. 8306, repealed. The hearing officer's conclusion that the doctrine of election of remedies is not applicable as a matter of law to a claim arising under the 1989 Act is based on the following reasoning:

1.The Legislature did not incorporate the election of remedies doctrine into

the 1989 Act;

2. The only provision in the 1989 Act relating to an election of remedies is Article 8308-3.08, which permits an employee on written notice to elect to opt out of coverage provided by an employer and thereby to retain the employee's common law right of action [we note that Article 8308-3.19 relating to the effect of compensation paid in other jurisdictions also provides for an election by a claimant];

3. Under the present law the remedies [group health insurance benefits and workers' compensation benefits] are not inconsistent because an adjustment or reimbursement between the group health carrier and the workers' compensation insurer is provided under Article 8308-4.68(c); and

4. Article 8308-4.21 (providing that an employee is entitled to income benefits to compensate the employee for a compensable injury) and Article 8308-3.09 (providing that except as otherwise provided for in the 1989 Act, an agreement by an employee to waive the employee's right to compensation is void), are incompatible with an election of remedies between group health and disability insurance and workers' compensation coverage.

Having reviewed the case law on election of remedies, the prior workers' compensation law, and the 1989 Act, we cannot conclude, as did the hearing officer, that the doctrine of election of remedies is inapplicable, as a matter of law, under the 1989 Act. First and foremost, the courts applied the election of remedies doctrine to workers' compensation claims involving group health insurance benefits under the prior law even though the prior law did not contain a statutory provision authorizing the application of such doctrine to such fact situations. The doctrine of election of remedies appears to be an equitable doctrine which is used by the courts to prevent manifest injustice. We do not think that the omission of a specific statutory provision in the 1989 Act concerning election of remedies between group health insurance and workers' compensation insurance is a sound basis for holding that the election of remedies doctrine does not apply under the 1989 Act in light of the application of such doctrine by the courts under the prior workers' compensation law which had the same omission.

Second, despite the fact that the prior workers' compensation law contained

provisions similar to those found in Articles 8308-3.08, 8308-3.09, 8308-4.21, and 8308-4.68(c) the courts still applied the election of remedies doctrine. See Article 8306, Sections 3a, 3c, 10 to 11a, 14, 15a, and 18 (repealed) (we recognize that under the prior law entitlement to weekly compensation was based on a worker's incapacity while under the 1989 Act entitlement is based on disability; however, fundamental to recovery of weekly compensation benefits under both the prior law and the new law was and is the existence of a compensable injury). Consequently, we do not consider the provisions of Articles 8308-3.08, 8308-3.09, or 8308-4.21 to be a sound basis for holding that the election of remedies doctrine does not apply to the 1989 Act.

Third, Article 8308-4.68(c), which is cited by the hearing officer as a provision in the 1989 Act which makes the remedies of group health insurance and workers' compensation benefits not inconsistent, merely provides that "[i]f the insurance carrier denies liability or entitlement to payment and an accident or health insurance company provides benefits to the employee for medical or other health care services, the right to recover that amount may be assigned by the employee to the accident or health insurance company." Considering that Article 8306, Section 3(c) (repealed) in the prior law is essentially the same as Article 8308-4.68(c) in the 1989 Act, and given the fact that Article 8308-4.68(c) only permits an employee to assign his right of recovery as opposed to requiring such assignment, we are of the opinion that the article, as written, would not, in all cases, prevent the manifest injustice to which the election of remedies doctrine is applied. Accordingly, we do not consider the provisions of Article 8308-4.68(c) to be a sound basis for holding that the election of remedies doctrine does not apply to the 1989 Act.

In sum, in our opinion the hearing officer erred in holding that as a matter of law the election of remedies doctrine is not applicable to a claim arising under the 1989 Act. The election of remedies doctrine was applied by the courts to workers' compensation claims under the prior law and we have not found an express legislative intent in the 1989 Act to eradicate that doctrine. The legislature knew that the election of remedies doctrine was applied under the prior law and if it desired to change established law, we believe it would have done so by express statutory provision.

Although we hold that the hearing officer erred in determining that the election of remedies doctrine is inapplicable to the 1989 Act, we do not find his determination to be reversible error under the particular facts of this case, because the hearing officer also concluded that the claimant did not elect to receive group health insurance benefits to the exclusion of workers' compensation benefits, which conclusion is supported by the evidence of record. In our opinion, the record does not clearly demonstrate that the claimant made her choice with a "full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice" as required by the Bocanegra case. *See also* Overstreet, *supra*. Perhaps more importantly, we do not find any

manifest injustice arising from the claimant's actions. Her situation in having several chiropractor bills for cold packs and adjustments for what she believed was a minor condition related to "tennis elbow" paid by the group health insurer is far removed from the untoward actions of the claimant in the Smith case, who filed under his group health insurance both before and after he filed his workers' compensation claims and only filed his workers' compensation claims when his group disability benefits were about to expire. In order to have an election of remedies, the facts must clearly demonstrate each and every element stated in Bocanegra, *supra*. *See* Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992 and Texas Workers' Compensation Commission Appeal No. 92678, decided January 1993. In Appeal Nos. 92273 and 92678, *supra*, the Appeals Panel applied the Bocanegra case in affirming the hearing officers' determinations that the claimants had not made an election of remedies between group health and disability plans and workers' compensation benefits. The issue in those appeals was whether the claimants had made an election of remedies; there was no assertion that the election of remedies doctrine does not apply to claims made under the 1989 Act. Consequently, the issue was not discussed in that context by the Appeals Panel.

Finally, the carrier contends that the hearing officer erred in finding that the claimant did not complete a physical therapy program because insurance coverage was denied. We are unable to determine the reason for this finding as it was not an issue at the hearing. Consequently, it may be disregarded as unnecessary to the decision. However, we do note that the finding is supported by the evidence of record.

The decision of the hearing officer is modified to reflect that the election of remedies doctrine as discussed in the Bocanegra case, may appropriately be applicable to claims arising under the 1989 Act, and as modified the hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge